U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES P. ZORN and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Pittsburgh, PA

Docket No. 99-1167; Submitted on the Record;
Issued January 11, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's entitlement to wage-loss compensation on the grounds that he refused an offer of suitable work.

On May 7, 1989 appellant, then a 34-year-old mailhandler, filed a claim for occupational disease alleging that he developed a painful knee condition as a result of his federal employment duties. The Office accepted appellant's claim for aggravation of bilateral patello-femoral syndrome and bilateral arthroscopic surgery. Appellant returned to light-duty work on May 3, 1990.

On July 14, 1990 appellant filed a claim for traumatic injury alleging that on July 12, 1990 he sustained additional injuries to his knees and back while unloading a container. The Office accepted appellant's claim for aggravation of his bilateral knee condition, chondromalacia and lumbar strain. On October 25, 1990 the Office combined appellant's two claims. Appellant worked intermittently from 1991 to June 24, 1993 when he stopped work.[1]

On August 27, 1993 appellant came under the care of Dr. Charles Stone, a Board-certified orthopedic surgeon, to whom he was referred by his primary care physician, Dr. Syed R. Hussaini, a Board-certified internist. Dr. Stone performed a right patellectomy on November 1, 1993 and a left patellectomy on October 20, 1994. On June 8 and 9, 1995 appellant underwent a functional capacity evaluation at the request of Dr. Stone. The summary report,

[1] On December 31, 1992 the Office issued a schedule award for a seven percent bilateral permanent impairment of the lower extremities. On August 4, 1993 the Office found appellant entitled to an award for an additional 11 percent permanent impairment of the right lower extremity and an additional 2 percent permanent impairment of the left lower extremity.

dated June 15, 1995, prepared by Steven R. Wagner, work hardening specialist and exercise physiologist, and Scott Buchanan, physical therapist, stated:

> "[Appellant's] work tolerances documented above are adequate for sedentary work provided that he be required to intermittently sit no longer than 23 minutes, walk no greater than 300 feet, or lift greater than 10 pounds on an occasional basis. He is capable of standing for short durations ([five] minutes), however his physical work tolerance is in such a diminished state that working for greater than [two] hours a day is unlikely at this time."

In a report dated July 14, 1995, Dr. Stone stated that a functional capacity evaluation performed on June 8 and 9, 1995 revealed that appellant was capable of performing sedentary work with restrictions on sitting for more than 20 minutes, walking more than 300 feet, lifting more than 10 pounds and standing for more than 5 minutes. Dr. Stone stated that within these restrictions, appellant could work two hours a day, effective July 14, 1995.

On July 18, 1995 Dr. Robert P. Durning, a second opinion Board-certified orthopedic surgeon, examined appellant at the request of the Office.[2] In his report, Dr. Durning provided his detailed findings on physical examination and noted that, since his prior examination, appellant had undergone a left patellectomy. He further stated:

> "In my opinion [appellant] will have a permanent physical impairment related to his knees.
>
> "In my opinion, [appellant] will never return to unrestricted work as a [m]ail [h]andler.
>
> "[Appellant] underwent a functional capacity evaluation … on June 8 and June 9, 1995 at the referral of Dr. Stone. The results of the functional capacity evaluation were summarized in a report dated June 13, 1995, issued by Steven R. Wagner, ASCM and Scott Buchanan, PT. [Appellant] tolerated sedentary activity and was considered adequate for sedentary work with modifications.
>
> "In my opinion, [he] is physically able to perform sedentary and light work.
>
> "In my opinion, [appellant] should be prohibited from kneeling, crawling, climbing ladders and working at unprotected heights.
>
> "In my opinion, [appellant] will be limited in his ability to stand or walk for long periods of time.
>
> "In my opinion, [he] has limits on his ability to squat."

On an accompanying work capacity evaluation form, Dr. Durning indicated that appellant could work eight hours a day, with no kneeling, crawling, ladder climbing, or working at

[2] Dr. Durning had examined appellant once before, on August 17, 1994, also at the request of the Office.

unprotected heights and with standing and walking limited to one hour at a time, four hours total per day, sitting limited to two hours at a time, eight hours total per day and bending and twisting at the waist limited to three hours total per day.

In a progress note dated July 19, 1995, appellant's attending physician, Dr. Stone, noted that appellant had returned to work and developed severe pain and was unable to continue with his job. Dr. Stone concluded that appellant was totally disabled due to his knee pain.

By letter dated June 14, 1996, the employing establishment offered appellant a full-time light-duty position as a mailhandler, rehabilitated. The employing establishment stated that all assigned duties would be in strict compliance with appellant's physical restrictions and would include no lifting of more than 20 pounds, standing and walking no more than one hour at a time, no more than four hours a day, occasional bending and twisting at the waist no more than three hours a day, sitting two hours at a time, up to eight hours a day and no kneeling, crawling, ladder climbing or working at unprotected heights.

On June 26, 1996 the Office advised appellant that the mailhandler (rehabilitated) position had been found to be suitable to his capabilities and was currently available.[3] Appellant was advised that he should accept the position or provide an explanation for refusing the position within 30 days. Finally, the Office informed appellant that, if he failed to accept the offered position and failed to demonstrate that the failure was justified, his entitlement to further compensation would be jeopardized.

By letter dated July 5, 1996, appellant stated that he could not accept the offered position. Appellant noted that Dr. Stone had referred him back to Dr. Hussaini, as there was nothing further that could be done for him. He stated that he had been falling a lot and had been prescribed a walker and felt that the employing establishment and the Office were trying to force him to do work that he could not do. Appellant submitted a June 18, 1996 attending physicians report, on which Dr. Hussaini checked a box indicating that appellant was totally disabled.

By letter dated July 30, 1996, after confirming that the offered job was still available, the Office informed appellant that his reasons for failing to accept the position were not acceptable, that no further reason for refusal "will be considered," that the medical opinions of Dr. Hussaini were insufficient to support a refusal of the light duty offered by the employing establishment and that he had 15 days to accept the position. The Office further advised appellant that, if he refused the offered position, his wage-loss compensation benefits would be terminated.

In a decision dated August 15, 1996, the Office terminated appellant's entitlement to wage-loss compensation benefits finding that he refused an offer of suitable work. Appellant requested an oral hearing and submitted additional evidence in support of his claim, primarily consisting of attending physician's supplemental reports, Form CA-20a, from his primary physician, Dr. Hussaini. Appellant additionally requested that the Office issue subpoenas for seven individuals, including the employing establishment's injury compensation specialist and

[3] Prior to the issuance of its June 26, 1996 letter, the Office had the job offer reviewed by an Office medical adviser, who confirmed that the position was within the physical restrictions set forth by the second opinion physician, Dr. Durning.

contract doctor and several Office claims examiners, to appear at the hearing. In a decision issued prior to the July 28, 1998 hearing, an Office hearing representative denied appellants request to subpoena the stated individuals. In a decision dated November 5, 1998 and finalized November 6, 1998, an Office hearing representative, having reviewed all of the additional evidence and arguments, affirmed the Office's prior decision.

The Board finds that the Office improperly terminated appellant's compensation under 5 U.S.C. § 8106(c) based on his refusal to accept suitable employment as offered by the employing establishment.

Once the Office accepts a claim it has the burden of proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.[4] This burden of proof is applicable if the Office terminates compensation under 5 U.S.C. § 8106(c), for refusal to accept suitable work.[5] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[6]

The implementing regulation provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.[7] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[8]

The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.[9] In assessing the medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[10]

In this case, the light-duty position offered by the employing establishment was found to be within the physical restrictions specified by the second opinion physician, Dr. Durning, a

[4] *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[5] *See Leonard W. Larson*, 48 ECAB 507 (1997).

[6] *Stephen R. Lubin*, 43 ECAB 564 (1992).

[7] *John E. Lemker*, 45 ECAB 258 (1993).

[8] *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon*, 43 ECAB 818 (1992).

[9] *Marilyn D. Polk*, 44 ECAB 673 (1993).

[10] *Connie Johns*, 44 ECAB 560 (1993).

Board-certified orthopedic surgeon, who examined appellant on July 18, 1995 and indicated that appellant was capable of performing sedentary and light work, eight hours a day, with certain additional physical restrictions. However, Dr. Stone, appellant's treating Board-certified orthopedic surgeon, opined in his July 14, 1995 report, that appellant was capable of performing sedentary duty, but only two hours a day, consistent with the results of the June 8 and 9, 1995 functional capacity evaluation. Subsequently, after a failed attempt to return to work, Dr. Stone opined that appellant was totally disabled due to his employment injury. Thus, the opinion of Dr. Durning is in conflict with the opinion of Dr. Stone, as to whether appellant is capable of performing the position, which the Office determined was medically suitable.

When there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Office shall appoint a third physician who shall make an examination.[11] Based on the above conflict in medical opinion the Board finds that the Office improperly invoked the penalty provision of section 8106(c) in this case. The record contains insufficient evidence to meet the Office's burden to show that the modified position appellant was offered was suitable.[12] The Office, therefore, improperly terminated appellant's wage-loss compensation benefits.

The decision of the Office of Workers' Compensation Programs, dated November 5, 1998 and finalized November 6, 1998, is reversed.[13]

Dated, Washington, DC
January 11, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Valerie D. Evans-Harrell
Alternate Member

[11] 5 U.S.C. § 8123(a); *see Dorothy Sidwell*, 41 ECAB 857 (1990).

[12] *See Craig M. Crenshaw, Jr.*, 40 ECAB 919 (1989) (finding that the Office failed to meet its burden of proof because a conflict in the medical evidence was unresolved).

[13] In light of this decision, the Office's denial of appellant's request to subpoena witnesses to testify at the July 28, 1998 oral hearing is moot and need not be further addressed by the Board.